

TOWN OF KITTERY, MAINE
BOARD OF APPEALS

APPROVED
April 24, 2012

Members present: Vern Gardner, Craig Wilson, Brian Boyle, Brett Costa

Members absent: Niles Pinkham

Staff: Heather Ross, Code Enforcement Officer

The meeting was called to order at 7:12 p.m.
Pledge to the Flag

Chairman Gardner advised the applicants of the minimum number of members present, requiring all members concur to grant the Variation requests, and asked if any applicants present wished to postpone their review before the Board.
There were none.

The Board has the authority under Title 16.6.5.11 Reconsideration, to hear the request to reconsider a variance appeal as the request was filed within 10 days (March 30, 2012) following the Board of Appeals denial on March 27, 2012.

Board members briefly discussed the reconsideration process and determined their discussion and action on March 27, 2012 was appropriate to entertain reconsideration at this time.

Item 1 – Philip Lowe requesting a Variance Appeal to the terms of Title 16 Section 3.2.3.D and Table 16.9 in order to construct a single family home at property located at 69 Chauncey Creek Road, Map 45 Lot 57 in the Kittery Point Village zone.

Patricia Tobey, representing the applicant, apologized for not attending the meeting of March 27, 2012. The applicant needs additional time to obtain detailed information on which to base their appeal and now wish to withdraw their application before the Board.

Chairman Gardner asked if there was anyone wishing to speak regarding this appeal.

Maury Hepner, 67 Chauncey Creek Road, read a letter outlining their concerns regarding the project (Attachment 1).

Mr. Gardner asked Mr. Hepner if he had any issue with the Board's reconsideration of the March 27 decision. **Mr. Hepner** stated he felt he could not comment on a procedural matter.

The CEO provided:

1. The appeal was originally heard on March 27, 2012.
2. The request for consideration was received on March 30, 2012 in a letter from Attorney Bedard;
3. State law provides that a Board may reconsider a decision within 45 days of its prior decision if the request to reconsider is filed within 10 days of the Board's decision.
4. This is a nonconforming vacant lot. Mr. Lowe is proposing to construct a new house and septic system on the lot.

5. Table 16.12 requires a 100-foot setback from wetlands greater than one acre in size for structures and septic systems.
6. Title 16.3.2.3 requires a minimum 40-foot front yard setback.
7. The proposed new dwelling unit would be located approximately 45 feet from the wetland, where 100 feet is required, and 28 feet from the front property line where 40 feet is required.

Discussion followed as to whether sufficient notice was given by the applicant to withdraw their application before the Board on March 27, 2012. In a letter from Attorney Bedard, it was stated the applicant left phone messages for the CEO on March 23 and March 26, the Assistant CEO on March 26, and submitted an email on Tuesday, March 27 at 9:25 a.m. requesting their application be withdrawn. The CEO stated the email did not come through until after the Board meeting on Tuesday evening, March 27. **Chairman Gardner** asked the CEO if she was satisfied the applicant took the necessary steps to notify staff of their withdrawal request. The CEO stated she was.

Board members further discussed the process for reconsideration of a decision.

Mr. Costa moved that the Board of Appeals reconsider its decision of March 27, 2012 in denying the variance appeal of Philip Lowe per Title 16.3.2.3 Table 16.12 and Title 3.2.3 at property located at 69 Chauncey Creek Road, Map 45 Lot 57 in the Kittery Point Village zone, and to grant the applicant's request to withdraw his application.

Mr. Boyle second

Motion carries unanimously by all members present

Chairman Gardner advised this decision may be appealed to Superior Court within 45 days.

Findings of Fact

1. The applicant failed to appear before the Board of Appeals as scheduled on March 27, 2012.
2. Following discussion at the March 27, 2012 meeting, the Board determined they would entertain a reconsideration by the applicant as permitted under MRS 30-A §2691.3.F and Title 16.6.5.11;
3. The applicant's agent provided testimony as to their desire to withdraw the application as additional information was needed;
4. Maury Hepner, abutter, read a letter noting his concerns (undated, attached).
5. The CEO noted the applicant attempted to notify staff of their wishes to withdraw the application before the Board prior to the March 27, 2012 meeting;
6. The request for consideration was received on March 30, 2012 in a letter from Attorney Bedard;
7. State law provides that a Board may reconsider a decision within 45 days of its prior decision if the request to reconsider is filed within 10 days of the Board's decision.
8. This is a nonconforming vacant lot. Mr. Lowe is proposing to construct a new house and septic system on the lot.
9. Table 16.12 requires a 100-foot setback from wetlands greater than one acre in size for structures and septic systems.
10. Title 16.3.2.3 requires a minimum 40-foot front yard setback.
11. The proposed new dwelling unit would be located approximately 45 feet from the wetland, where 100 feet is required, and 28 feet from the front property line where 40 feet is required.

Mr. Boyle moved to accept the Findings as read
Mr. Costa seconded
Motion carries unanimously by all members present

Conclusion

The Board has the authority under 16.6.5.11 Reconsideration. The applicant filed a request for reconsideration three days following the Board's decision, and the Board agreed to grant reconsideration and accept the applicant's withdrawal of his application.

Mr. Costa moved to accept the Conclusion as read.
Mr. Boyle seconded
Motion carries unanimously by all members present

Item 2 – Clamdaddy, Inc. requesting a Miscellaneous Appeal to the terms of Title 16 Section 8.10.6 and Title 16 Section 8.10.12 in order to replace existing signage on property located at 315 U.S. Route 1, Map 38 Lot 5 in the Commercial 1 zone.

Michael Landgarten, owner, explained he appeared before the Board on March 13, 2012 for awning replacement, but must reappear before the Board for any sign change as they are a nonconforming lot. The applicant is not enlarging the sign area, but changing the sign content only.

Chairman Gardner asked if there was anyone wishing to speak regarding this appeal.

There was no public comment. The CEO provided:

1. Title 16.8.10.6 allows for a single business situated on a lot of record to have a total sign area no greater than three hundred square feet, or one and one half square feet for every linear foot of building frontage.
2. The allowable sign area for Bob's Clam Hut is 106.5 square feet. The existing signage is greater than allowed.
3. The proposed replacement of signs would not change or increase the square footage of the signs that currently exist on the property.

Board discussion followed regarding nonconformity. **Chairman Gardner** asked the applicant if he could eliminate signage, bringing the total sign area more into conformity. Following further discussion, Board members concurred the applicant is not increasing his sign area, and the ordinance allows the applicant to retain his existing non-conforming sign area.

Mr. Costa moved to grant to Clamdaddy, Inc. a Miscellaneous Appeal to the terms of Title 16 Section 8.10.6 and Title 16 Section 8.10.12 in order to replace existing signage with no increase in sign area on property located at 315 U.S. Route 1, Map 38 Lot 5 in the Commercial 1 zone.
Mr. Boyle seconded
Motion carries unanimously by all members present

Findings of Fact

1. Michael Landgarten, representing Clamdaddy, Inc., requested changing the content of two

- existing signs without any change in sign area square footage;
2. There was no public comment;
 3. The CEO stated the allowable signage is approximately 106.5 square feet with existing signage at 130-140 square feet;
 4. Title 16.8.10.6 allows for a single business situated on a lot of record to have a total sign area no greater than three hundred square feet, or one and one half square feet for every linear foot of building frontage.
 5. The allowable sign area for Bob's Clam Hut is 106.5 square feet. The existing signage is greater than allowed.
 6. The proposed replacement of signs would not change or increase the square footage of the signs that currently exist on the property.

Mr. Boyle moved to accept the Findings as read

Mr. Costa seconded

Motion carries unanimously by all members present

Conclusion

The Board determined the existing signs lawfully existed on October 1, 1997, sign area will not be increased, and the Board has the authority under Title 16.8.10.12 Nonconforming Existing Signs to grant the applicant's request to alter the signs' contents.

Mr. Costa moved to accept the Conclusion as read

Mr. Boyle seconded

Motion carries unanimously by all members present

Item 3 – Elizabeth Perkins requesting an Administrative Appeal to a Notice of Violation issued March 26, 2012 for property located at 34 Pocahontas Road, Map 51 Lot 4, zoned Residential Rural Conservation.

Blane Sillsby, owner with Elizabeth Perkins, explained they approached the Code Enforcement Officers asking if a building permit is required to construct a tree house and was told one was not. The applicant provided a sketch showing the location of the tree house on the property and within the wetland setbacks.

Chairman Gardner asked if there was anyone wishing to speak regarding this appeal.

Barbara McLeod, abutter, presented photos of the tree house, noting the tree house had a concrete base and was a greater structure than a 'tree house'.

There was no further public comment. The CEO provided:

1. This is a nonconforming lot with nonconforming structures located within the Rural Conservation and Shoreland zones;
2. Ms. Perkins was issued a notice of violation for constructing a structure approximately 10 feet from the edge of the wetland where a 100-foot setback is required;
3. Though a setback would not be considered for a child's tree house, the structure that has been constructed appears to be more than a tree house and meets the definition for a structure, requiring a 100-foot setback from a wetland.
4. The Notice of Violation requires the structure be removed.

Mr. Wilson acknowledged he had been contacted by Ms. McLeod on Friday, April 13 and discussed Board procedures. Ms. McLeod explained her position, which was the same as presented before the Board at this meeting, but they did not discuss the case any further. **Mr. Gardner** acknowledged he had received an email from Ms. McLeod, but did not read it and deleted it. **Mr. Boyle** acknowledged he had also received the same email and printed out the information contained in the email, including a letter and photos. **Mr. Costa** did not receive any communications from Ms. McLeod. **Chairman Gardner** explained discussions with applicants or others regarding an item before the Board are considered ex parte communications and are illegal. Following a lengthy discussion, each Board member stated the communications by or with Ms. McLeod would not bias or prejudice their consideration of the merits of the item before them. **Chairman Gardner** asked if any member of the public felt the Board may be biased based on the communications made by Ms. McLeod. **Ms. Perkins**, applicant, stated she was unaware she could present materials to the Board on the night of the meeting, and did not contact any Board members prior to the meeting. She stated the Board has received information without their knowledge prior to the meeting that appears to be incorrect, and "it kind of looks like you've had the chance to be biased, whether you may perceive it as you're sitting there, from our point of view we were not given a clear shot at presenting our case." **Mr. Gardner** asked her if she believes any member is biased regarding this issue. **Ms. Perkins** stated that is hard to say until the decision is rendered. **Mr. Gardner** stated she does not have two chances, only one. **Ms. Perkins** stated the Board can go ahead with their judgment. **Ms. McLeod** stated she tried to find the process on the Kittery web site, but could not, and calls and emails to the Code Enforcement Officers went unanswered. She asked, for the record, that information be provided to individuals about the appeal process. **Mr. Gardner** asked Heather Ross, CEO, if she felt the Board or members of the Board is biased. **Ms. Ross** stated "No, but the ability to be biased could be [construed] from the email" and recommended the email be shared with the applicant. **Mr. Boyle** stated the applicant should have the opportunity to see the photos and the email submitted by Ms. McLeod. **Ms. McLeod** read the email dated April 23, 2012 into the record (Attachment 2). **Mr. Sillsby** noted the posts under the tree house are on concrete blocks, not footings, and sit on top of the ground. The structure is used as a tree house, not for storage or housing people or livestock. He acknowledged the location is 10 feet from the wetlands and property line. The tree house was designed to resemble Hagrid's Hut from the Harry Potter movies and built for his 12 and 13 year old children.

Board discussion followed regarding the definition of a structure and the intention of the applicant to provide a play area for their children. There is no definition of a tree house, but the definition of a structure appears to apply in this case.

Mr. Costa moved to grant an Administrative Appeal to a Notice of Violation issued March 26, 2012 to remove a structure from property located at 34 Pocahontas Road, Map 51 Lot 4, zoned Residential Rural Conservation.

Mr. Wilson seconded

Motion fails, with 0 in favor, 4 opposed, 0 abstentions

Mr. Boyle moved to provide the applicant 60 days from April 25, 2012, to correct the violation.

Mr. Costa seconded

Motion carries unanimously by all members present

Findings of Fact

1. Blane Sillsby and Elizabeth Perkins requested an Administrative Appeal to a Notice of Violation to remove a tree house on their property located at 34 Pocahontas Road;
2. Applicant testified they were told by the Code Enforcement Officers that a tree house could be placed anywhere on the property without a building permit;
3. Applicant testified there was no reference to tree houses in the ordinance as it pertains to this appeal;
4. This is a nonconforming lot with nonconforming structures located within the Rural Conservation and Shoreland zones;
5. Ms. Perkins was issued a notice of violation for constructing a structure approximately 10 feet from the edge of the wetland where a 100-foot setback is required;
6. Though a setback would not be considered for a child's tree house, the structure that has been constructed appears to be more than a tree house and meets the definition for a structure, requiring a 100-foot setback from a wetland;
5. Barbara McLeod, abutter, testified in opposition of the appeal and presented photos of the structure and an email describing the structure and its location adjacent to the wetlands and property lines;
6. There was discussion about contact of the Board members via phone and email by Ms. McLeod, and whether the Board was biased based on this communication. The applicant and the CEO were given the opportunity to respond to this.
7. An email on April 23, 2012 was read into the record (Attachment 2).
8. Mr. Sillsby stated there are no permanent footings for the tree house, but it is sitting on concrete block, and was constructed as a children's playhouse, not for storage or as a dwelling.

Mr. Costa moved to accept the Findings as read.

Mr. Boyle seconded

Motion carries unanimously by all members present

Conclusion

The Board concurred with the CEO's determination that this tree house constituted a structure and required setbacks, and upheld the CEO's notice of violation.

Mr. Costa moved to accept the Conclusion as read.

Mr. Boyle seconded

Motion carries unanimously by all members present

Chairman Gardner advised the applicant has 45 days to appeal the decision of the Board to Superior Court.

Elections:

Mr. Costa submitted that the same slate of officers be retained for 2012, specifically:

Vern Gardner, Chairman

Craig Wilson, Vice Chairman/Secretary

Board members concurred unanimously.

Board members continued with an informal discussion regarding ex parte communications and nonconforming structures and uses.

Mr. Wilson moved to accept the minutes of March 27, 2012 as presented.

Mr. Boyle seconded

Motion carried unanimously by all members present

Mr. Gardner moved to adjourn

Mr. Boyle seconded

Motion carried unanimously by all members present

The Kittery BOA meeting of April 24, 2012 adjourned at 9:15 p.m.

Submitted by Jan Fisk, April 27, 2012

ATTACHMENT 1

Heather Ross
Code Enforcement Officer, Town of Kittery
Code Enforcement Office
200 Rogers Rd
Kittery, Maine 03904

RE: ZBA Application: Variance Appeal for property located at 69 Chauncey Creek Rd, Map 45 Lot 57 of the Kittery Point Village zone

Dear Ms Ross:

We want to express our concerns regarding conditions related to the Philip Lowe variance appeal for construction of a new single family home on property located at 69 Chauncey Creek Road.

Firstly, the boundary between our abutting property at 67 Chauncey Creek Road and the above property has not been established. The boundary survey obtained by Mr. Lowe, dated July 18, 2006 and used in the variance request documents, contains the following note regarding the boundary with the prior owners or our property, the Preeces:

Note 4: "The information in both the Preece and Lowe deeds, as well as the physical evidence along the common boundary, lacks information to position the boundary with any certainty. We suggest a boundary line agreement to resolve this matter."

The common boundary has not been resolved.

Secondly, we are very concerned about the proximity of the intended house and septic system to the wetlands. This is not a vernal pond but an active, dynamic wetlands system that flows year-round and acts as a buffer, filtering runoff from the adjacent areas. During rainfall, it absorbs a significant amount of water and increases dramatically in volume. The outflow brook, as part of the wetlands, discharges the water across the road to an estuary area in Chauncey Creek. This is a fragile system that demands the protection afforded in the existing code.

Yours truly,

Maury and Anne Hepner
67 Chauncey Creek Rd.
Kittery Point, Maine 03905

ATTACHMENT 2

From: barbara@crosscurrentcommunications.com
To: boyle0731@comcast.net, Drummer1@comcast.net, CWilson515@207ME.com, "vern Gardner" <verngardner@comcast.net>
Cc: "Heather Ross" <HRoss@kitteryme.org>, "Shelly Bishop" <sbishop@kitteryme.org>
Sent: Monday, April 23, 2012 10:47:22 AM
Subject: "treehouse" controversy

Dear Members of the Kittery Board of Appeals,

I am sending you these photos so that you can be prepared for the meeting this Tuesday night. My neighbor, Lee Perkins, is appealing an order to remove a "treehouse" that was built in violation of Kittery's regulations regarding building permits and wetlands setbacks.

It is clearly a permanent structure that has concrete footings, despite being built around a tree. There was no building permit.

The building is 4 feet from my property line, 4 yards from the marsh, and a few more yards to the ocean beach.

Thank you in advance for viewing the photos.

Please feel free to call me if you would like to come see the structure in person. I am at 30 Pocahontas Rd in Kittery Point. My phone number is 207 752-0484 if you have any questions.

I look forward to seeing you Tuesday night. If anyone has an email address for Niles Pinkham could you please forward this message to him.

Best regards,

Barbara MacLeod